

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-221845 **DATE:** May 23, 1986
MATTER OF: David Boland, Inc.

DIGEST:

1. General Accounting Office (GAO) will not review contracting officer's nonresponsibility decision relating to a small business unless the protester shows either possible fraud or bad faith on the part of government officials or where the Small Business Administration (SBA) either failed to follow its own regulations or failed to consider vital information bearing on the bidder's responsibility.
2. Protester has not shown that Navy's contracting officer or any other government official acted in bad faith in finding protester to be nonresponsible or that SBA ignored information vital to protester's competency in declining to issue certificate of competency to protester where Navy's and SBA's decisions were based on: (1) protester's unsatisfactory "quality of work" performance rating on identical prior contract for "super flat concrete construction," which was to be employed on the proposed contract; and (2) the proposed contract's critical performance schedule which did not allow time for contractor to rework mistakes. Other contracts cited by protester as evidence of its responsibility did not involve this construction requirement or contain critical construction schedule.
3. Protester has not shown that Navy's contracting officer refused in bad faith to reverse his determination of nonresponsibility based on new information arising after SBA had declined to issue protester certificate of competency but before contract was awarded. Even though new information showed that protester's overall performance rating on prior, critical Navy contract had been

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changed from "unsatisfactory" to "marginally satisfactory," protester's "quality of work" rating on prior contract was still rated as unsatisfactory.

David Boland, Inc. (Boland), protests the January 31, 1986, award of a contract to another bidder under invitation for bids (IFB) No. N68248-83-B-3137 which was issued by the Department of the Navy for the construction of "Limited Area Missile Motor Magazines" at the Naval Submarine Base, Kings Bay, Georgia. The essential part of this contract is the construction of superflat concrete floor slabs. In order to move the missiles stored at the magazine across the floor, the slabs must be level and extremely smooth.

The Navy's contracting officer determined that Boland, the low bidder under the IFB, was not a responsible prospective contractor. The Navy concluded that Boland was non-responsible primarily because of Boland's unsatisfactory performance on a prior missile assembly area contract which had the identical specification for superflat concrete slabs as the current IFB, and the same "criticality of the schedule and quality control." Subsequently, the Small Business Administration (SBA) declined to issue Boland a certificate of competency (COC) for this project. The SBA based its determination on its finding that, on the similar project, Boland had managed its subcontractors poorly, had performed poor quality work, had quality control problems and had difficulty producing a superflat slab. Based on this information, the SBA declined to issue a COC because there was no reasonable assurance that Boland could complete the critical contract for the motor magazine on time.

Boland alleges that the Navy's contracting officer showed bad faith toward it in reaching his determination and that the SBA acted in "willful disregard for the facts relating to Boland's responsibility and competency to perform the contract so as to imply bad faith on the part of the SBA."

We deny the protest.

The SBA has statutory authority to review a contracting officer's determination of nonresponsibility and then to determine conclusively the responsibility of small business concerns by issuing or declining to issue a COC. 15 U.S.C. § 637(b)(7) (1982). For this reason, we will not independently review a contracting officer's nonresponsibility decision relating to a small business since such a review

would be tantamount to a substitution of our judgment for that of the SBA. Apollo Bedding, Inc., B-218502.2, May 17, 1985, 85-1 C.P.D. ¶ 570. Our Office generally limits its review of the denial of a COC to cases in which the protester shows either possible fraud or bad faith on the part of government officials or where the SBA either failed to follow its own regulations or failed to consider vital information bearing on the bidder's responsibility. Bid Protest Regulations, 4 C.F.R. § 21.3 (f)(3) (1985); Tri-Marine Industries, Inc., B-210652.3, May 12, 1983, 83-1 C.P.D. ¶ 503. Boland does not allege that the SBA failed to follow its own regulations.

The essential question, therefore, is whether Boland has shown possible fraud or bad faith on the part of the government officials or, alternatively, whether the SBA failed to consider vital information bearing on Boland's responsibility.

We have held that a protester bears a heavy burden of proof when alleging bad faith on the part of government officials; the protester must establish clearly that these officials had a specific and malicious intent to injure the protester. Ebonex, Inc., B-213023, May 2, 1984, 84-1 C.P.D. ¶ 495. Inference and suspicions will not support a finding of bad faith. Id.

NAVY'S ACTIONS

Boland alleges that the Navy failed to impartially and intelligently evaluate its capabilities to perform the contract to the extent that the Navy was willing to pay a contract price almost one-half million dollars more than the Boland bid price. Further, Boland says that the Navy acted in bad faith toward it by the allegedly inconsistent treatment of the company on three procurements. These procurements, Boland says, are not materially different from each other, yet the Navy considered Boland nonresponsible for this procurement while the Navy awarded two contracts to Boland after the SBA issued a COC for one and recommended the issuance of a COC for the other.

In our view, none of these allegations establish that the Navy had a specific and malicious intent to injure Boland. Specifically, as to the allegation of the Navy's alleged inconsistent treatment of Boland on three different procurements the record shows that the Navy considered that the subject procurement for magazines was unique in that it involved a superflat concrete construction requirement

and a very critical construction schedule which did not allow rework time should the contractor make mistakes. Given these differences between the current procurement and the two other procurements cited by the protester and the Navy's unsatisfactory experience with Boland on a prior contract for a missile assembly area involving superflat concrete construction, we cannot conclude that Boland has established that the contracting officer acted in bad faith in finding Boland to be nonresponsible. Consequently, we deny this ground of protest.

SBA ACTIONS

Boland's essential argument concerning our review standard of SBA's COC decision is that the SBA "failed and refused to contact representatives of government agencies other than the Navy for whom Boland has performed significant contract work" and that these agencies would have demonstrated Boland's "technical competence and ability to maintain contract schedules" had they been queried.

The SBA acknowledges Boland's good performance on other projects performed for National Aeronautics and Space Administration (NASA) and the Army Corps of Engineers but notes that those contracts did not require the construction of superflat concrete slabs or contain a critical performance schedule. SBA says it, therefore, saw no need to contact NASA or the Army Corps of Engineers concerning Boland's performance since the information would not have caused SBA to change its decision on the proposed contract. Nevertheless, the Navy has advised us that it informed SBA of Boland's good performance on the NASA and the Corps of Engineers contracts. In any event, SBA further says that, based upon the information available to it as of January 27, 1986, regarding the Navy's then-final evaluation of Boland's performance on the prior Navy contract for superflat concrete construction, SBA would not have changed its denial of Boland's COC application.

According to the SBA, the information it obtained from the Navy on January 27 concerning this prior Navy contract was that Boland's final contract evaluation would be unsatisfactory in two of the five evaluation areas (poor quality control and poor quality) and that the overall performance rating would be unsatisfactory. Consequently, the SBA decided that, given Boland's prior performance history on

the above contract, the "criticality" of the schedule, and the need for quality control in the superflat construction of the magazines, it would not issue a COC for Boland.

Based on the SBA's explanation of its decision, we cannot conclude that the SBA improperly ignored information relating to Boland's prior contract performance history with NASA and the Army's Corps of Engineers.

Boland also argues that it was improper for the contracting agency and the SBA to rely on Boland's alleged inadequate performance under the prior missile assembly contract to find Boland ineligible for this contract. However, this Office has held that a nonresponsibility determination may be based on a contracting agency's reasonable perception of inadequate prior performance by the contractor even where the contractor disputes the agency's interpretation of the facts. Martin Widerker Engineer, B-219872 et al., Nov. 20, 1985, 85-2 C.P.D. ¶ 571.

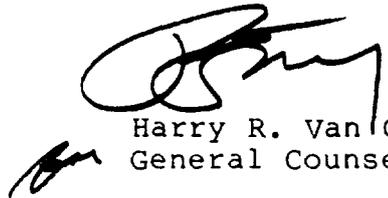
NEW INFORMATION

Boland argues, in effect, that, based on new information which became available after the date of SBA's COC denial, the Navy should have reconsidered and reversed its nonresponsibility determination. A contracting agency may properly reconsider and reverse its nonresponsibility determination even when the SBA has declined to issue a COC when, for example, new information bearing on a small business concern's responsibility is presented. Tomko, Inc., 63 Comp. Gen. 218 (1984), 84-1 C.P.D. ¶ 202.

The new information available after January 27, 1986, was that the Navy had changed its overall rating of Boland's performance under the prior contract for missile assembly from unsatisfactory to marginally satisfactory. It did not, however, change Boland's unsatisfactory rating for "quality of work," although the contracting officer noted that Boland's "top management was cooperative and ultimately took action to correct all quality problems pointed out by the Navy." This new information was apparently presented to the Navy's contracting officer for the instant procurement by the protester after the date of SBA's COC denial and before award was made to another concern. Consequently, the contracting officer properly could consider the new information. See Appletown Food Service and Management Corp.-- Reconsideration, B-218201.5, July 1, 1985, 85-2 C.P.D. ¶ 5.

Nevertheless, this new information did not cause the contracting officer to reverse the nonresponsibility determination. Although Boland argues that the contracting officer's decision not to reverse his determination was incorrect for a number of reasons, this alleged error is not tantamount--especially given the continued "poor quality of work" rating under Boland's prior Navy contract--to a showing of bad faith on the part of the contracting officer. Consequently, we also deny this ground of protest.

The protest is denied.



Harry R. Van Cleve
General Counsel